IN THE

Supreme Court of the United States

October Term, 1964

No. 723

LAKE ERIE STEELHEAD CAMP ASSOCIATION,
Petitioner,

v.

MARGARET DEE DEE, *et al*, *Respondents.*

On Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Appellate District of Ohio

PETITIONER'S REPLY MEMORANDUM

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February 4, 1965.

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In response to the Brief of Respondents opposing the Petition for Writ of Certiorari, petitioner desires to make the following points plain:

1. Raising the Federal Questions

Respondents' contention (Opp., p. 3) that the federal questions were not seasonably raised in the courts below is belied by the record. The certification by Judge Brown, a certification not disputed by respondents, conclusively demonstrates that the federal constitutional issues were in fact raised by petitioner and were considered and denied by the Court of Appeals. That certification dissipates respondents' suggestion that raising these questions for the first time in the application for rehearing in the Court of Appeals came too late.[1] The Court of Appeals—the highest state court dealing with the issues—denied the federal claims on their merits rather than on any supposed procedural deficiency. And it denied these claims in the course of denying the application for rehearing, which was petitioner's earliest opportunity to press the federal issues.[2]

Further confirmation of the timely existence of the federal issues is to be found in the action of the Supreme Court of Ohio in dismissing the appeal from the

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[1] Respondents erroneously state (Opp., p. 3) that petitioner failed to mention in the Petition for Writ of Certiorari that these questions were raised for the first time in the application for rehearing in the Court of Appeals. The Petition expressly pointed out this fact (Pet., p. 7) and explained the reason therefor.

[2] As explained in the Petition (p. 7), under Ohio law the proceedings in this equity matter before the Court of Appeals were *de novo* rather than appellate in nature. Ohio Constitution, Art. 4, § 6; Ohio Rev. Code, § 2505.21; *Connelly* v. *Balkwell*, 160 Ohio St. 430; *Cupps* v. *City of Toledo*, 172 Ohio St. 536. Not until the Court of Appeals judgment was rendered did it become apparent that it went beyond the issues raised and the relief requested by respondents in their pleadings. Then and then only could the federal issues be raised.

Court of Appeals "for the reason that no *substantial* constitutional question exists herein" [Emphasis added]. The Supreme Court thus dismissed the appeal not because the federal issues had been first raised in the rehearing application below but because the constitutional questions were thought to lack sufficient substance to warrant review.

Hence, the federal claims having been actually considered and decided by the highest state court dealing with the merits of the case, this Court "need not inquire how and when the [federal] question . . . was raised." *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U.S. 182, 185-186. Here, as in *Raley* v. *Ohio,* 360 U.S. 423, 436, "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." In this context, any inquiry by this Court into how or when the question was raised in the state courts becomes irrelevant in determining the appropriateness of exercising this Court's certiorari jurisdiction. An irrebutable presumption as to the proper raising of the federal issues has been created by the action of the Court of Appeals —as attested to by the certification of Judge Brown— in considering and denying the merits of the federal questions even though they were first raised in the rehearing application. And the action of the Supreme Court of Ohio in treating the federal issues in terms of their substance rather than their procedural timeliness only confirms that presumption.

2. The Substantiality of the Federal Issues

Respondents do not seriously challenge the substantiality of the federal constitutional questions raised by the judgment below. The constitutional defect of the

lower court decree appears plain: a lessor has been deprived of his constitutional property rights simply because of a finding that he ignored certain past breaches of covenants by certain lessees. Because of those past waivers, petitioner as lessor has been held to have forfeited all right to enforce the lease covenants (other than as to rent and taxes) in the future, even as to

> (1) those lessees who committed no breaches in the past that might have been considered waived, and
>
> (2) those lessees whose past breaches were not of a continuing nature and whose future breaches might be of an entirely different nature than those of the past.

The completely indiscriminate nature of the judgment below, voiding nearly all of the covenants in a large number of 99-year leases, raises in unavoidable form the due process and equal protection questions set forth in the Petition. Indeed, those questions are presented in a most aggravated setting—the lessor's property rights having been declared forfeited *on a retroactive basis* due to past waivers of breaches. At the time of those breaches, the lessor had no notice and no reason to believe that a waiver would result in a total voiding of the right to enforce *virtually all* the covenants in *all* the leases in the future.

The failure of the Ohio courts to respect the legitimate concerns and the constitutional rights of this lessor, particularly in the absence of any countervailing state concern, makes appropriate plenary review by this Court.

CONCLUSION

For these reasons, supplementing those set forth in the Petition, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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